

LAW OFFICES
GOLDBERG, GODLES, WIENER & WRIGHT
1229 NINETEENTH STREET, N.W.
WASHINGTON, D.C. 20036

Handwritten: COPY

HENRY GOLDBERG
JOSEPH A. GODLES
JONATHAN WIENER
HENRIETTA WRIGHT
W. KENNETH FERREE
THOMAS G. GHERARDI, P.C.
MARY J. DENT
COUNSEL

RECEIVED
APR 01 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
(202) 429-4900
TELECOPIER:
(202) 429-4912
e-mail:
general@fcc.gov
g2w2.com

April 1, 1999

EX PARTE

Linda Kinney
Office of Commissioner Ness
Federal Communications Commission
445 12th Street, SW
Room 8B-115

Re: CC Docket No. 96-98

Dear Ms. Kinney:

I came across a decision by the Nebraska PSC that seems to deal with MDU access for CLECs in a fair and thoughtful way. Unfortunately, my client does not have any systems in Nebraska. I thought you might be interested in seeing what they are doing.

Sincerely,

Handwritten signature: Ken
W. Kenneth Ferree
Attorney for OpTel, Inc.

cc: Magalie R. Salas, Secretary

No. of Copies rec'd
List A B C D E

Handwritten: 0+1

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission,) Application No. C-1878/PI-23
on its own motion, to determine)
appropriate policy regarding)
access to residents of multiple) ORDER ESTABLISHING STATEWIDE
dwelling units (MDUs) in Nebraska) POLICY FOR MDU ACCESS
by competitive local exchange)
telecommunications providers.) Entered: March 2, 1999

APPEARANCES:

For the Commission:

John Doyle
300 The Atrium
1200 "N" Street
Lincoln, NE 68508

For US West Communications:

Charles Steese
1801 California, Suite 1500
Denver, Co 80202

For the Community Associations Institute:

David Tews
1630 Duke Street
Alexandria, VA 22314

For Cox:

Jon Bruning
8035 S. 83rd Avenue
LaVista, Nebraska
and
Carrington Phillip
1400 Lakehearn Drive
Atlanta, Georgia

BY THE COMMISSION

On August 5, 1998, the Commission, on its own motion, opened this docket to determine appropriate policy regarding access to residents of multiple dwelling units (MDUs) in Nebraska by competitive local exchange telecommunications providers (CLECs). Notice of this docket was published in The Daily Record, Omaha, Nebraska, on August 10, 1998, pursuant to the rules of the Commission.

Cox Nebraska Telcom II, L.L.C. (Cox) previously filed a formal complaint (PC-1262) against US West Communications, Inc. (US West) with this Commission concerning access to residents of MDUs. Upon review of the complaint, the Commission was of the opinion that as competition developed further in Nebraska markets, it would be in the best interest of the public that the Commission develop a gene-

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

Application No. C-1878/PI-23

PAGE 2

ral overall policy regarding access to MDUs. Therefore, the Commission opened this docket and Cox withdrew its complaint against US West.

The Commission began its investigation by requesting that all interested persons submit comments on this issue by September 8, 1998. On September 14, 1998, the Commission held a hearing on these issues in the Commission Hearing Room in Lincoln, Nebraska, with the appearances as shown above.

E V I D E N C E

Carrington Phillip, vice president of Cox, testified as follows: Local exchange competition should not be something that is limited only to those who are fortunate enough to own their own homes. To resolve this issue, Cox believes that it is necessary to permit all certificated carriers who want to invest in serving tenants in MDUs the opportunity to efficiently do so. Cox suggested that the Commission develop a solution that removes artificial barriers related to historical network design and the incumbent's inherent monopoly power so that competition can flourish.

In facilitating implementation of competition in the provisioning of local exchange service, Cox suggested that its proposal would strike a regulatory balance between property rights of the incumbent local exchange carrier (ILEC) and the requirements established for state regulators in the Telecommunications Act of 1996 (Act).

Cox suggested that the ILEC should be ordered to establish a minimum point of entry (MPOE) as close to the edge of the MDU property line as possible. The ILEC could retain ownership of the cable, conduit, etc. between the demarcation point and the newly located MPOE, but should receive a reasonable one-time cost-based amount to move the MPOE to the property line. Furthermore, a CLEC should pay the ILEC a one-time fee equal to 25 percent of the replacement value of this cable, conduit, etc. for access. Replacement value should be defined as the new cost of the copper wire. Replacement cost should be estimated to be \$4.20 per cable foot, based on the cost of 600 pair cable.

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

Application No. C-1878/PI-23

PAGE 3

Maintenance and repair of the facility should be accomplished by a third-party contractor approved by the ILEC and the current service provider. The maintenance and repair would be performed in accordance with mutually agreed upon national standards with the cost borne by the ILEC and CLEC on a percentage basis.

Mr. Alan Bergman, Director of State Market Strategies for US West in Nebraska, testified as follows: US West agrees strongly that the tenants in MDUs should have choice. However, Mr. Bergman emphasized that other carriers currently have an opportunity to provide MDU customers with a choice. All local exchange carriers, including US West, are required under the Act to make available for resale at wholesale rates their retail services. Furthermore, nothing is preventing CLECs such as Cox from constructing their own facilities up to the demarcation point as US West has done. Either of these methods would provide choice for MDU residents.

US West proposes that competitors should be able to use a portion of the unbundled loop and the so-called sub-loop unbundling in order to provide local service to an MDU resident. This would require that a competitor pay the cost, a one-time non-recurring charge, for the installation of a new cross-connect box at a point agreed to by the owner near the property line where the facility comes into the MDU property. Then, beyond that, the competitor would pay an average cost-based rate determined through the cost docket for the portion of the unbundled loop that it uses.

Mr. David Tews, representing the Community Associations Institute, testified as follows: The Commission should recognize the self-determinate process and the role the community associations play in maintaining, protecting and preserving the common areas, the values of the community or the value in an individually owned property within the development. To fulfill these duties, community associations must be able to control, manage, and otherwise protect their common property.

O P I N I O N A N D F I N D I N G S

After hearing testimony, reviewing briefs and other comments filed in this docket, the Commission believes that a statewide policy regarding CLEC access to residential MDUs is necessary to

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

Application No. C-1878/PI-23

PAGE 4

protect the rights of MDU residents. The primary purpose of this order is to create a uniform framework that parties throughout the state, incumbents and competitors alike, can utilize to serve residents of MDUs. Such a statewide policy should foster competition while simultaneously providing the residents of MDUs a realistic opportunity to select their preferred telecommunications provider.

The National Association of Regulatory Utility Commissioners (NARUC) explicitly recognized the problem in its "Resolution Regarding Nondiscriminatory Access to Buildings for Telecommunications", adopted July 29, 1998. In that resolution, the NARUC Committee noted that some states, including Connecticut, Ohio and Texas, already require building owners and incumbent telephone companies to give tenants access to the telecommunications carrier of their choice. Nebraska is no different, and this Commission believes residents of Nebraska MDUs should have the same choice.

The intent behind the Telecommunications Act of 1996 was to open up the telecommunications market for competition. However, residents of MDUs have generally been unable to reap the benefits of this industry transformation.

It is true that competition has brought many desirable changes to the telecommunications industry. However, the benefits of competition have not come without a certain amount of additional costs. MDU residents must be given the opportunity to take advantage of competition if they are to be expected to bear any increased costs associated therewith. As such, the Commission believes that residential MDU properties must be opened up to competition.

In order to develop a statewide framework for access to residential MDUs, the Commission finds the following:

Upon the request of a CLEC or any multi-tenant residential property owner (Owner), an ILEC shall provide a MPOE at the MDU property line or at a location mutually agreeable to all parties. The ILEC, or a mutually agreeable third party or CLEC, as identified in a pre-approved list of third-party contractors and CLECs, must complete the move of the MPOE in the most expeditious and cost effective manner possible. Nothing contained herein shall

Application No. C-1878/PI-23

PAGE 5

limit or prohibit access to MDU properties by any competitive carrier through any other technically feasible point of entry.

The CLEC or requesting Owner shall pay the full cost associated with said move. CLECs who connect to the MPOE within three years of the move's completion shall contribute on an equitable and nondiscriminatory pro-rata basis to the initial cost of said move based upon the number of CLECs desiring access to the MDU through such MPOE.

The demarcation point¹ shall remain in its current position unless otherwise agreed to by the parties. If the demarcation point remains unmoved, then the ILEC shall retain ownership of any portion of the loop between the demarcation point and the newly moved MPOE as well as any existing campus wire (jointly referred to hereafter as "campus wire"). Said CLECs shall be authorized to use the ILEC's campus wire for a one-time fee of 25 percent of "current" construction charges of the portion of the loop between the demarcation point and the newly moved MPOE based upon an average cost per foot calculation. The average cost per foot shall be derived from a sample of recently completed ILEC construction work orders for MDUs, with the resulting calculation subject to periodic Commission review. CLECs which connect to the MPOE within three years of the move's completion shall contribute on an equitable and nondiscriminatory pro-rata basis to the one-time aggregate 25 percent charge for use of the ILEC's campus wire. The portion due from each carrier shall be based upon the number of CLECs desiring access to the MDU through such MPOE.

Maintenance of the campus wire and the MPOE itself shall be performed by the ILEC, or a mutually agreeable third party or CLEC, as identified in the pre-approved list of third-party contractors and CLECs. Such maintenance shall be completed in accordance with national standards and in the most expeditious and cost effective manner possible. Maintenance expenses shall be paid by all current users of such MPOE on a pro-rata basis based upon the percentage of current customers within the affected MDU building or property on the start date of maintenance.

¹ The demarcation point is the point at which the telephone company's facilities and responsibilities end and customer-controlled wiring begins.

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

Application No. C-1878/PI-23

PAGE 6

Exclusionary contracts and marketing agreements between telecommunications companies and landlords are anti-competitive and are against public policy. Exclusionary contracts are barriers to entry and marketing agreements can have a discriminatory effect. Therefore, the Commission believes, with the following exception, that all such contracts and agreements should be prohibited.

The Commission is of the opinion that since condominiums, cooperatives and homeowners' associations are operated through a process where each owner has a vote in the entity's business dealings, the prohibitions against exclusionary contracts and marketing agreements should not apply to this type of entity.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that this order hereby establishes a statewide policy for residential multiple dwelling unit access in the state of Nebraska.

IT IS FURTHER ORDERED that all telecommunications providers shall comply with all applicable foregoing Findings and Conclusions as set forth above.

IT IS FURTHER ORDERED that since condominiums, cooperatives and homeowners' associations are operated through a process where each owner has a vote in the entity's business dealings, the prohibitions against exclusionary contracts and marketing agreements shall not apply to this type of entity.

IT IS FINALLY ORDERED that should any court of competent jurisdiction determine any part of this order to be legally invalid, the remaining portions of this order shall remain in effect to the full extent possible

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

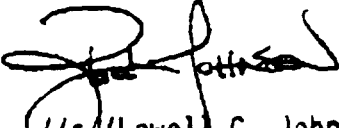
Application No. C-1878/PI-23

PAGE 7

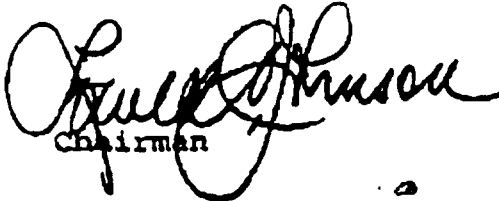
MADE AND ENTERED at Lincoln, Nebraska, this 2nd day of March,
1999.

NEBRASKA PUBLIC SERVICE COMMISSION

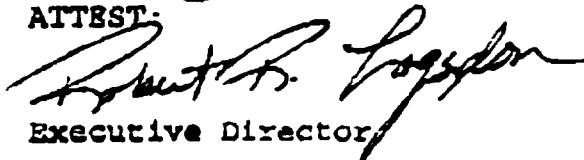
COMMISSIONERS CONCURRING:


//s//Lowell C. Johnson
//s//Frank E. Landis

COMMISSIONERS DISSENTING:
//s//Daniel G. Urwiller


Chairman

ATTEST:


Executive Director